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In The

Supreme Court of the United States

October Term, 1991

ABIGAIL RUTH MARSHALL
and DONALD BERGERSON,

Petitioners,

vs.

SAN FRANCISCO DEPARTMENT OF SOCIAL SERVICES; DAVID AND JOYCE OWEN; STANLEY MARSHALL; CASSANDRA MARSHALL,

Respondents.

Petition For Writ Of Certiorari
To The Court Of Appeal Of The State Of California
First District, Division Three

BRIEF OF RESPONDENTS SAN FRANCISCO DEPARTMENT OF SOCIAL SERVICES, DAVID AND JOYCE OWEN AND CASSANDRA MARSHALL IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

1. Did the California Supreme Court err in letting stand the state Court of Appeal's decision affirming adoptive placement of the minor, Cassandra M., with her foster family, based on the minor's best interests in the lasting emotional bond with the foster parents, over placement with petitioners, relatives who had never unequivocally presented themselves as willing to adopt Cassandra and who had only belatedly requested custody of the minor one year after she had been placed with the foster parents?

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STATEMENT OF CASE

Cassandra M. ("Cassie"), the minor who is the subject of this action, was born suffering severe drug withdrawal, the result of her natural mother's drug abuse during the pregnancy. Consequently, on September 19, 1988, the San Francisco Department of Social Services ("Department") commenced this action, filing a dependency petition pursuant to California Welfare and Institutions Code section 300(a).[1]

The San Francisco Juvenile Court sustained the dependency petition on December 1, 1988. The Juvenile Court declared Cassie a dependent child within the meaning of Section 300(a) and committed her to out-of-home placement. The Juvenile Court expressly found that placement with relatives was inappropriate due to Cassie's still fragile medical condition. Petitioners, Abigail Ruth Marshall and Donald Bergerson, Cassie's paternal aunt and uncle, did not appear at the hearing to seek custody of Cassie. (CT 22-23; RT1 9-11.)[2]

Dependency was renewed in August 1989, because Cassie could not yet be reunited with her natural parents.

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[1] All statutory references hereinafter will be to the California Welfare and Institutions Code, unless otherwise indicated. For the Court's convenience, the California Codes governing child welfare and dependency proceedings are discussed more fully below at pp. 20 through 24.

[2] References are to the Clerk's Transcript ("CT") and to the six volumes of Reporter's Transcripts ("RT") of San Francisco Juvenile Court proceedings below. The Reporters' Transcripts will be designated by volume number, as "RT1", "RT2", and so forth. Because the volumes were misnumbered (there are two numbered Volume 6 of 6), the volumes will be referred to as 1 through 6 for simplicity.

Neither petitioner appeared at the dependency status review hearing. (CT 27-38.)

In November 1989, the Department recommended a permanent plan of adoption for Cassie. The matter came before the Juvenile Court for permanency planning proceedings on November 16, 1989. In order to evaluate the Department's recommended permanent plan, on December 28, 1989, the Juvenile Court ordered *ex parte* independent assessments of Cassie's relationships with the Owens, Cassie's foster family, and with petitioners. (CT 41.)

In January 1990, petitioners appeared in these proceedings for the first time, with the filing of an application for modification of the Juvenile Court's December 1988 dependency order. Concurrently, petitioners requested an order granting them the status of "interested parties" and an order placing Cassie with them rather than with the Owens. (CT 54-59.) The Juvenile Court granted petitioners standing to proceed with the application to modify Cassie's placement pursuant to Welfare and Institutions Code section 388.[3] At the same

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[3] Welfare & Institutions Code section 388 provides:

> Any parent or other person having an interest in a child who is a dependent child of the juvenile court or the child himself through a properly appointed guardian may, upon grounds of change of circumstance or new evidence, petition the court in the same action in which the child was found to be a dependent child of the juvenile court for a hearing to change, modify, or set aside any order of court perviously made or to terminate the jurisdiction of the court. The petition shall be verified and, if made by a person other than the child, shall state the petitioner's relationship to or interest in the child and

(Continued on following page)

time, based on the independent evaluation, the court found that Cassie's weekly weekend visits to petitioners' home were detrimental to her well being and consequently ordered the visits decreased to biweekly half-day visits. The court also ordered separate counsel appointed for Cassie. (CT 89; RT1 14-38.)

At a court-ordered settlement conference on March 1, 1990, the parties were unable to mutually agree on a permanent plan for Cassie. The court instead ordered the parties to submit the matter to mediation with a court-appointed counselor. Because the parties were too hostile to use the mediation process productively, the court set the case for trial on the recommended permanent plan and the Section 388 petition. (CT 92, 94-95, 98.)

The Juvenile Court commenced trial of the permanency planning and Section 388 proceedings on April 16, 1990. The court denied petitioners' pretrial motion to dismiss dependency and place Cassie immediately with petitioners. Then, on May 17, 1990, after hearing weeks of exhaustive testimony, the Juvenile Court denied petitioners' Section 388 application for modification, allowed

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(Continued from previous page)

shall set forth in concise language any change of circumstance or new evidence which are alleged to require such change of order or termination of jurisdiction.

If it appears that the best interests of the child may be promoted by the proposed change of order or termination of jurisdiction, the court shall order that a hearing be held and shall give prior notice, or cause prior notice to be given, to such persons and by such means as prescribed by Section 386, and, in such instances as the means of giving notice is not prescribed by such sections, then by such means as the court prescribes.

Cassie to remain in the Owens home and ordered adoption as the permanent plan. (CT 210-232; RT6 197.) Commissioner Everett Hewlett, Jr., ruling for the court, found that, contrary to the assertions made by petitioners, they "never unequivocally said they wanted the Department of Social Services to place the child with them until December 1989." (Pet. at App.1, p. 6; RT6 191-192.) Commissioner Hewlett further found that the Owens had continuously provided Cassie with the physical and psychological nurturing of parents during the entire period she was in their home, despite their indecision about whether they would eventually adopt her. (Pet. at App.1, p. 7; RT6 192.)

The Juvenile Court later denied petitioners' application for rehearing of the Section 388 petition on the grounds that petitioners lacked standing to seek rehearing under Welfare and Institutions Code section 252. Petitioners appealed the denials of both the Section 388 petition and the rehearing. (CT2 1-23.)[4]

The California Court of Appeal affirmed the Juvenile Court's permanent plan for Cassie. The Court held that at the permanency planning stage of the dependency proceedings, the best interest of the minor, including the preference for continuation of the existing emotional bond between the child and the foster parents, prevails and any previous preference for placement with relatives becomes irrelevant once the permanent plan of adoption

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[4] Petitioners could not appeal from the permanency planning order. The order confirming the Department's recommended permanent plan of adoption and refering Cassie's case for initiation of proceedings terminating parental rights is a non-appealable order. Welf. & Inst. Code § 366.25(j).

is made. Appendix 1 to the Petition for Writ of Certiorari ("Pet.") at 17.

Petitioners' petition for review in the California Supreme Court was denied on December 18, 1991.

SUMMARY OF ARGUMENT

There are no sound reasons to grant the petition for writ of certiorari in this case. Contrary to the assertions made in the petition now before this Court, petitioners Bergerson and Marshall have never been ready, willing and able to unequivocally offer Cassie the stability and commitment of adoption into their family. This simple fact is amply supported by the record and informs the decisions of both the Juvenile Court and the Court of Appeal.

California law grants relatives a preference for placement in dependency proceedings up until the permanency planning stage. Petitioners here were not denied a preference. They simply came forward for Cassie too late.

From the time Cassie was removed from her natural parents, petitioners had numerous opportunities to present themselves to both the Department of Social Services and to the Juvenile Court to demonstrate a committment to adopt Cassie. They never did so. They affirmatively declined to take Cassie at birth, because of her extreme fragility and medical complications incident to her drug withdrawal. Later, they were concerned that Cassie would interfere with their relationships with their own two children. Then petitioners offered their friends, Carla and Tom Garrett, as adoptive parents for Cassie. Finally, petitioners proposed legal guardianship as a plan for Cassie, so that she would not lose inheritance rights to family land and so that she would not be a "rival" to their own children. Never did petitioners unconditionally offer to take Cassie in as their adopted child.

The trial court found, and the Court of Appeal affirmed, that petitioners had not even unequivocally presented themselves as a placement for Cassie until December 1989, after Cassie had been with her foster parents, the Owens, for a full year. The court-appointed expert, Dr. Toni Vaughn Heineman, found in March 1990 that, in Cassie's mind, Joyce Owen was her mother and David Owen her father. Indeed, from the beginning Joyce and David Owen, offered Cassie a loving and stable home, loved and cared for her as if she were their own child during her painful drug withdrawal and restored her to health and happiness. They want Cassie and have made an unconditional committment to adopt her.

In short, the facts underlying this case are not as presented by petitioners. The Juvenile Court did not deny petitioners any fundamental right. The court granted them standing as interested parties and permitted them to appear with private counsel and to pursue the Section 388 petition. The Juvenile Court based its decision to allow Cassie to remain with her foster family on the factual finding that Cassie's best interests were best served by permanent placement in the Owens' stable nurturing home. Nothing can change the fact that Cassie sees the Owens as her parents.

REASONS THE PETITION SHOULD BE DENIED

I. PETITIONERS HAVE NEVER UNEQUIVOCALLY PRESENTED THEMSELVES AS AN ADOPTIVE PLACEMENT FOR CASSIE AND NEVER ASKED THAT CASSIE BE PLACED WITH THEM UNTIL ONE YEAR AFTER CASSIE WAS PLACED WITH THE OWENS.

Petitioners present themselves to this Court as "fit near-relatives" who have been willing and waiting to take

Cassie into their home since the inception of this case. This is not so. In fact, during the four weeks Juvenile Court trial of the Section 388 and permanency planning proceedings, the only such portrayal of petitioners came from the testimony of petitioner Marshall herself. Because petitioners present such an incomplete depiction of the facts of the case and because this is a case about factual determinations, it is necessary to review some of the factual history of Cassie's case.

Born September 3, 1988, the only daughter of Teresa S. and Stanley M., Cassie was four weeks premature and exhibited severe drug withdrawal symptoms. She tested positive for cocaine, cocaine metabolites, codeine, morphine, methadone and methadone metabolites. At the time of Cassie's birth, Stanley was incarcerated in Illinois, having been arrested on federal drug charges. (Pet. at App.1, p. 3; CT 1, 3, 17.)

Cassie was placed first in the Fragile Infant Special Care ("Baby-Moms") foster home of Yvonne Eldridge. Then, in December 1988, Cassie was placed in the Baby-Moms home of Joyce and David Owen. Cassie has since continuously resided with the Owens, their two sons, Michael and Eric and another foster child, LaMar, who was also a fragile infant placed through Alameda County. (Pet. at App.1, p. 3; CT 17, 50-52; RT5 16-17.)[5]

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[5] The Baby-Moms program is a San Francisco program for infants suffering from severe drug withdrawal and other related medical complications. It is the only such program in the state. Its purpose is to identify children who have special needs, secure and train special foster parents for those children, provide and coordinate medical care and involve other programs according to the special needs of each child. (CT 16; RT1 44-45.)

Cassie was a child much in need of the Baby-Moms program. When she was placed in the Eldridge home, she exhibited signs of severe drug withdrawal, irritability, sweats and lack of coordination in feeding. She was hypertonic and difficult to console, sometimes crying for up to 20 hours a day. (CT 30; RT1 55-56.) When Cassie was placed with the Owens family three months later, she was still a difficult child, screaming for hours every day. She was rigid and would not make eye-contact. Her feeding was still uncoordinated. Cassie slept in Joyce and Dave Owens' bedroom due to her frequent night-waking. (Pet. at App.1, p. 3; RT6 22.)[6]

However, Cassie's condition improved drastically within the first month of her placement. By her first birthday, Cassie was a happy baby, just beginning to walk. She regularly went to bed without crying and slept through the night. She could make eye-contact with all of the Owens family members. (Pet. at App.1, p. 3; RT5 23.)

When Cassie was most medically fragile and in the Baby-Moms program, petitioners did not offer their home to her. Nor did petitioners or any other relatives come forward to offer Cassie a home at the time the Juvenile Court ordered out-of-home placement for Cassie. Nor did petitioners object when Cassie was placed in the Owens' home at the age of three months.

The record does not support petitioners' contention that Cassie's father "*arranged* for her care by asking his

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[6] Petitioners' suggestion that the Owens took in foster children "for money" is not only insulting, but it ignores the selfless commitment the Owens made to nurse and heal Cassie at a time when she was suffering and gravely ill, a commitment petitioners were not willing to make.

sister and her husband, petitioners here, to raise Cassandra on his behalf." (Pet. at 3) The only statement in the record that even approximates this assertion was made by an attorney for Stanley (Cassie's father) at the dispositional hearing in December 1988. (RT1 9.)[7] That statement is, of course, not evidence. Petitioners did not appear at the disposition hearing to offer Cassie their home. Moreover, when the Department's caseworker, Geri Dito-Peavey, contacted Stanley in January 1989 to ask whether he could offer a home for Cassie, he responded that he could not, because he was incarcerated. More importantly, he did not offer petitioners or any other relatives as a potential home for Cassie. (RT1 142-143.)

Petitioners contend that during 1989, they "repeated their request to raise Cassandra." (Pet. at 3.) This assertion is deceptive in the first instance because, in fact, petitioners never had made any request to raise Cassie. Petitioners cite, not the factual record, but only the Court of Appeal's opinion, for their assertion. In fact, no credible evidence was presented to the Juvenile Court, and that court found none, to support petitioners' claim that they had always sought to take Cassie. Rather, the factual evidence shows that in March and April of 1989, when Cassie's drug withdrawal symptoms had begun to abate, Ms. Dito-Peavey discussed with petitioners the possibility of placing Cassie in their home. Petitioners quote

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[7] The statement made by Stanley's attorney was:

> [Stanley] says that his sister and her husband *can* take Cassandra *when the social worker or the health providers say the baby can leave the frail care center she's in now.* (RT1 9.)

the record out of context when they state that the Department's case worker, Ms. Dito-Peavey, "dragg[ed her] feet" in placing Cassie with them. (Pet. at 3.) Ms. Dito-Peavey's testimony in fact was that in July 1989:

> . . . I talked to [petitioner] Abby about possible placement options. At that time, I know Abby had said, "Well, [Cassie's] at a crucial point in her skill. Maybe we would wait a little while until after her first birthday," and I went along with that to some extent, dragging my feet.
>
> We also talked about the procedure through the Department, that the matching committee would give me three adoptive homes and that Abby and I would sit down together and go over those homes. (RT2 404.)

Ms. Dito-Peavey also testified that petitioner Marshall had indicated wanting to be involved in the selection of Cassie's adoptive home. In early 1989 petitioner Marshall was visiting Cassie in her foster home approximately once every four to six weeks. At that time, Cassie appeared normal and healthy. However, petitioners did not express any interest in having Cassie in their home. (RT1 110-111, 147). Instead, petitioners consistently expressed concern that, having two children of their own, the economic and emotional burden of having another child in the home was too great. Petitioner Marshall was especially concerned about rivalry between Cassie and her own daughter, Alyse. (RT1 60, 78-79, 109; RT3 662-663.)

Far from desiring to have Cassie in her home, during July, August and September of 1989, petitioner Marshall discussed with Ms. Dito-Peavey the possibility, indeed their hope, that the Owens would adopt Cassie. (RT1 111.) Petitioner Marshall also communicated to Ms. Dito-Peavey that Stanley too supported the Owens adoption of Cassie. (RT1 129.) They all regarded the Owens home

very favorably and believed life with the Owens would be wonderful for Cassie. Petitioners even discussed paying support to the Owens for Cassie in the event the Owens adopted her. (RT1 61-62, 76-77, 111-129.) In July 1989, petitioner Marshall informed Ms. Dito-Peavey that she wanted Cassie in a home other than her own, one that would "spoil" her. (RT1 80, 110-111.) In short, at no time up to this point had petitioners ever offered Cassie their home.

At this same time, the Owens were considering adopting Cassie. According to Ms. Owen, her relationship with petitioners had been a good one prior to November 1989. Petitioners occasionally visited Cassie in the Owens home. Later they would pick up Cassie, take her out and return her a few hours later. (RT5 23-24.) Prior to December 1989, petitioners had never expressed to Ms. Owen any interest either in adopting Cassie or in becoming her legal guardian, although the three of them had several discussions regarding the possibility of the Owens adopting Cassie.

Ms. Owen recalled first considering adopting Cassie as early as July 1989, when she went on vacation without Cassie and truly missed her. The Owens began discussing adoption of Cassie in September 1989. She also recalled telling petitioner Marshall in September 1989 that she loved Cassie very much and was considering adopting her. On those occasions, petitioner Marshall responded that she was pleased and that the Owens' home was the kind of family she had hoped for for Cassie, because they lived in the suburbs, had children and were, importantly, a religious family. (RT 5 24-26.) Granted, the Owens too had reservations. They had two teenage children of their own, many financial responsibilities and another foster child. They were also concerned about starting over late

in life with young children. (RT1 75; RT5 27-29.) Nevertheless, the Owens continued to provide Cassie a loving and supportive home, where Cassie thrived.

Because of their concerns, in approximately October 1989, the Owens told Ms. Dito-Peavey that they could not adopt Cassie. One month later, in November 1989, petitioners for the first time expressed interest in having Cassie in their home but on "a trial basis." At the same time, they offered their friends, Carla and Tom Garrett, as a prospective adoptive home for Cassie. Petitioner Marshall felt that if Ms. Garrett, her best friend and former law partner, took Cassie in, petitioners could maintain contact with Cassie. (RT1 81-82.) It is apparent that petitioners wanted the benefit of a relationship with Cassie, when convenient for them and with none of the attendant responsibility.

In order to begin to move Cassie into a prospective new home, during December 1989, the Department allowed overnight visits to be arranged between Cassie and petitioners and between Cassie and the Garretts. (RT1 83.) There were two weekend visits and a longer visit. According to Ms. Owen, Cassie seemed fine and healthy when she left for the visits. However, Ms. Owen observed that after returning from visits, Cassie's behavior was changed. She screamed when she was put to bed, awoke screaming during the night and screamed when she woke up in the morning. Whereas before she had been a very independent little girl, she became "clingy" and whining, hanging onto Ms. Owen's leg and crying, calling out for her if separated from her for a moment. This was not Cassie's usual behavior. (RT5 30-32.)

Then, on December 15, 1989, the Owens informed Ms. Dito-Peavey that they had changed their minds and made a commitment to adopt Cassie. (RT5 28.) Since then,

the Owens have never waivered in their decision to adopt Cassie. (RT5 29.) Petitioners were fairly angry at this complication. They informed Joyce Owen that as Cassie's relatives, they were entitled to "a right of first refusal" of Cassie. (RT1 86-87.) However, at that point, petitioners still had not made any commitment to Cassie. During December 1989, petitioners indicated to the Department only that they preferred to have legal guardianship of Cassie, in order to retain rights to Cassie's inheritance and to avoid rivalry with their daughter, Alyse. (RT1 90-91, 112.)

Then, on December 28, 1989, Ms. Dito-Peavey received a letter from appellant Marshall asking, "for the record," that Cassie be placed immediately in their home. (RT1 91.) *This was the first time since Cassie's birth that petitioners had definitively requested that Cassie be placed in their home.* (RT3 671.) Petitioners gave no reason for their change of heart. It was Ms. Dito-Peavey's impression that they did not want to "lose" and simply wanted to prevent the Owens from having Cassie. (RT1 88-89, 182.)[8] At the same time, the Garretts announced that they would not adopt Cassie. (RT1 85, 92.)

Even at this critical stage, petitioners never indicated that they wished to adopt Cassie. They continued to ask only for legal guardianship over Cassie, essentially so

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[8] Petitioners' thinly veiled suggestion that the Owens were anti-Semitic and that Cassie's "Jewish ancestry" should dictate her placement with a Jewish family (Pet. at 4,) are unsupported by the record and are in any event irrelevant. In fact, Cassie's natural mother, Teresa, is Catholic. (Pet. at App.1, p. 4.) Therefore, under traditional Jewish law, Cassie is not actually Jewish. Moreover, nothing in the record suggests that either Stanley or Teresa have ever expressed to the Department any concern regarding Cassie's religious upbringing.

that they could tell Alyse that she had no "rival" and that they were only caring for Cassie because there was no other "suitable" home for her. (RT1 111-112.) Petitioners were also looking to the financial benefits to be had through enforcing child support obligations against Stanley, which would not be available were petitioners to adopt Cassie. (RT3 719.) Petitioner Marshall also contemplated giving Cassie to her friend, Carla Garrett, if petitioners were to become Cassie's legal guardians. (RT1 90.) For obvious reasons, the Department did not believe that petitioners had a strong committment to Cassie. (RT1 91.)

Because the hostilities between the parties were increasing and because Cassie was reacting adversely to the tug-of-war and routine "passing around" of the visits, Ms. Dito-Peavey terminated overnight visits with petitioners, with the concurrence of the Department's consultant, Dr. Alicia Lieberman. When the visits ceased, petitioners became still angrier and expressed feelings of betrayal. They showed no sympathy for Cassie's feelings and needs in the situation. (RT1 92-93, 95-96, 102.) However, Cassie returned to her normally happy, independent behavior after the overnight visits ceased. (RT5 32-33.)

In January 1990, the Department received correspondence from Cassie's mother, Teresa, asking that Cassie be placed with the petitioners. Teresa had up to that time consistently asked that Cassie not be placed with the petitioners because she, Teresa, did not get along with them and she believed they would not let her see Cassie. Teresa had felt that Cassie would be well taken care of by the Owens and she could visit her there. Ms. Dito-Peavey later learned that petitioner Bergerson had lied to Teresa, telling her that Cassie was abused and neglected by the Owens, in order to coerce her into changing her position. (RT1 112-114, 118-123.)

Because the custody dispute between the parties grew increasingly antagonistic, Ms. Dito-Peavey determined that an outside evaluation was necessary in order to establish a placement recommendation that served Cassie's long-term best interest. For that reason, Ms. Dito-Peavey engaged Dr. Toni Vaughn Heineman to evaluate Cassie's relationships with both petitioners and the Owens. (RT1 181, 206.) At that point, Ms. Dito-Peavey had not made up her mind concerning Cassie's placement. However, the Owens clearly loved Cassie and Cassie had thrived in their home. On the other hand, petitioners had come on the scene late, were ambivalent and had only committed to take Cassie in reaction to the Owens' decision. (RT1 62-63, 211-212.)

Dr. Heineman, an expert in child psychology with special expertise in attachment and child development issues, conducted the evaluation of Cassie's relationship with the Owens and with petitioners in February and March 1990. (RT1 244-245.)

Dr. Heineman testified that Cassie had a positive relationship with the Owens, who were clearly quite fond of her, were able to read all of her signals and responded appropriately to her needs. Cassie was "bouncy and bubbly" with them and looked to the Owens as her parents. (RT1 259.)

On the other hand, Dr. Heineman observed that Cassie was subdued and tentative with petitioners. She was "pleasant" to them but did not relate to them as her "parents." Observing Cassie in petitioners' home, Dr. Heineman noted that not only did Cassie not seek out petitioner Bergerson, she consistently and obviously avoided contact with him. (RT1 260-261, 343; Exhibit 2 at trial (4/17/90).) Dr. Heineman also saw Cassie with petitioners in her office. The doctor observed that Cassie was

not pleased to be left alone with petitioners. She was unhappy and "shut down" under the stress of the situation. By the end of the session with Dr. Heineman, Cassie had fallen asleep sitting between the petitioners on the couch. According to Dr. Heineman, this is not a normal way for children to behave and, under the circumstances, indicated that Cassie is not strongly attached to petitioners. (RT1 259-262, 278-279, 292-293.)

Based on her evaluation and observations, which the Juvenile Court found very credible, Dr. Heineman concluded that it would be "very, very detrimental" to Cassie to remove her from the Owens home and place her with petitioners. Dr. Heineman testified poignantly that Cassie would experience the move as if the Owens family left home one day and was killed in an accident. For Cassie, the whole Owens family and the family home would disappear. A child of Cassie's age and prior history of medical fragility would be devastated by such a move. (RT1 263.)

According to Dr. Heineman, Cassie does not now have the capacity to understand that petitioners are her "relatives." (RT1 345, 349.) To move her to a new "family", merely because they were related, would betray Cassie's confidence in the world as a safe, reliable and predictable place. Moreover, Cassie would lose Joyce Owen, her psychological "mother." In the opinion of Dr. Heineman, this would cause Cassie to lose the ability to develop object constancy, that sense of "a parent" inside which would allow her to go into the world and feel secure. Moving Cassie, when there is no compelling need to do so, would also lead Cassie to develop attachment problems and would interfere with her later attempts to develop autonomy and independence. (RT1 284, 288.) Without this ability, Dr. Heineman concluded, Cassie will

be a very empty little girl and could become severely depressed. (RT1 263, 273-275, 338-339, 355-356.)

Dr. Heineman observed that what a child needs most is security, lasting relationships and the knowledge that parents are parents. Anything less than adoption involves a holding-back by a caretaker, a lack of commitment depriving the child of emotional definiteness. Consequently, Dr. Heineman recommended adoption as the most permanent and stable alternative for Cassie. (RT1 269, 271.)[9]

Ultimately, based on her own case involvement and on Dr. Heineman's evaluation, Ms. Dito-Peavey also concluded that adoption by the Owens best served Cassie's interests. Petitioners had consistently put their needs ahead of Cassie's and could not see what was best for her. (RT1 214-231.) Meanwhile, Cassie had been in the Owens' home for 18 months and had a good relationship with the Owens and her foster siblings. Cassie had a close and loving relationship with her foster brothers Michael and Eric. She also had a close relationship with LaMar, whom the Owens also intended to adopt. She was clearly attached to the Owens family. In contrast, Cassie did not have the same attachment to petitioners. (RT1 63-65.)

Moreover, through the Owens, Cassie also had contact with members of her natural mother's family. She

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[9] Petitioners' expert, Dr. William Schwartzman, admitted having no experience with issues of parent-child attachment, attachment disorder, nor any experience with children of Cassie's age. He based his opinion solely on information obtained from petitioners about the case. He had never spent any time with Cassie, had never met the Owens and had never seen Cassie relating to any of the parties. The Juvenile Court found Dr. Schwartzman's testimony "unpersuasive" and "not too credible." (Pet. at App.1, p. 7; RT4 passim; RT6 195.)

saw her mother, Teresa, her great-aunt and uncle, Maureen and Ron Willis and her great grandparents. She spent holidays with all of them at the Willis' home. Joyce Owen also threw a birthday party for Cassie on her first birthday and invited all her maternal relatives as well as petitioners "because they're Cassie's aunt and uncle." (RT5 34-36.) Nothing in the record suggests that petitioners will similarly provide Cassie with this important contact with her extended maternal family. Rather, the facts strongly indicate that petitioners would not honor or support Cassie's ties with her maternal family. (RT1 219, 223.) Petitioner Marshall's remarks to the Juvenile Court regarding Cassie's mother, Teresa - that "she existed" and that appellant "wouldn't compare her with mother Teresa despite her name" (RT3 630) - demonstrate not only a stunning lack of compassion and sensitivity, but also give the strongest possible indication that if allowed to have custody of Cassie, petitioners would negatively prejudice, if not actively thwart, Cassie's future relationship with her maternal relatives.

In this case, the evidence clearly demonstrates that what is best for Cassie is to remain in the stable loving home provided by the Owens. The Owens nursed her through her nightmare of drug withdrawal and provided her with the loving care to develop into a normal, happy, secure child. The Owens also provided her with contact with both of her parents and all of her relatives, maternal and paternal. Dr. Heineman, who saw Cassie with the Owens, concluded that Joyce and David Owen were Cassie's psychological "mother" and "father." They love her and want to make a home for her.

On the other hand, petitioners have never unconditionally offered their home as a permanent placement for Cassie. They have considered taking her in only out of a

sense of familial obligation, and only in reaction to the Owens' decision to adopt Cassie. Petitioners have never committed to adopting Cassie. To the end, petitioner Marshall involved her friend and former law partner, Carla Garrett, as a potential adoptive placement for Cassie. Ms. Garrett herself ultimately testified that she would not have committed to adopting Cassie if petitioner Marshall had wanted her. (RT3 836, 839.) Thus, they played a sort of "bait and switch" with Cassie and with the Department. Petitioner Marshall has been more concerned with Cassie's inheritance and with the emotional burden Cassie might place on their family, than in providing her with a stable, nurturing environment. (RT2 432-433, 676, 752.)

In short, this is a case decided on factual issues and does not rise to the level of a federal case, much less a case suitable for review by this Court. Even if, *arguendo*, petitioners, as relatives, can assert a constitutionally-based placement preference, petitioners in this case were consistently ambivalent and uncommitted. While this medically fragile child was developing a close, intimate and nurturing psychological relationship with her foster parents, petitioners were keeping their options open, including considering placement of Cassie with their friends, the Garretts. The record clearly demonstrates that despite opportunities to take Cassie, petitioners were unable or unwilling to make an unequivocal commitment. Therefore, petitioners are not in a position to claim that their constitutional rights, if any, were abridged. Nor does this case present a suitable or adequate record for determining the sensitive issue of whether relatives enjoy an absolute constitutional placement preference.

II. ADEQUATE CONSTITUTIONAL PROCEDURES TO DETERMINE WHETHER CHILDREN SHOULD BE PLACED WITH RELATIVES ARE AVAILABLE UNDER CALIFORNIA LAW AND WERE FOLLOWED IN THIS CASE

California child welfare laws set forth the procedural and substantive protections for children and families that come within the juvenile court dependency system in this state. The statutory scheme embodies a strong policy directing the Juvenile Court to make placement and permanency planning decisions that protect and promote the best interest of the child. Furthermore, the law requires that the court consider the placement of minors with appropriate relatives, consistent with the child's best interests and in a manner that promotes the physical and emotional well-being of the child.

Whenever a minor child is removed from his or her biological parents, the Juvenile Court and the Department first consider placing the child with available relatives. Welfare and Institutions Code section 309 requires that the Department of Social Services release the minor to the custody of the minor's parent, guardian *or responsible relative* unless one or more conditions exist. The conditions under which a child is not placed with relatives include (1) when the parent, guardian or relative is not able or willing to provide care for the minor, and (2) when detention is necessary for the protection of the minor and there are no reasonable means by which the minor can be protected in his or her home or in the home of a responsible relative. Welf. & Inst. Code § 309.

Welfare and Institutions Code section 281.5 requires the Department to give "primary consideration" to placing a child with relatives if the placement is in the

minor's best interests and will be conducive to reunification of the family.[10]

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[10] The California Court of Appeal gave careful attention to the standard set forth in Section 281.5 in *In re Baby Girl D.* (1989) 208 Cal.App.3d 1489. That case presents facts closely analogous to the instant case. In *Baby Girl D.*, the minor was born addicted to heroin. Taken into protective custody at birth, Baby Girl D. was declared a dependent and, at age three months, placed in a foster-adoptive home. At the permanency planning hearing, the juvenile court referred the case for termination proceedings, because the mother could not reunify with the minor. The mother appealed, contending that the trial court erred in not placing the child with the mother's aunt. The Appellate Court unequivocally rejected the mother's contention that the great-aunt deserved preferential consideration as a "relative" within the meaning of section 281.5 and 361.5 of the Welfare and Institutions Code. The Court also held that, even if the great-aunt were considered a "relative", she failed to timely intervene and request placement of the minor until permanency planning hearing, after the minor had bonded with the foster parents. The Court explains:

> "Section 281.5 requires the probation officer who is recommending removal of a minor from the physical custody of the parent to prefer placement with a relative, *if it is in the best interests of the child and conducive to reunification with the parent.* . . .
>
> The object of dispositional hearings is to find a temporary caretaker who will meet the child's physical and psychological needs while cooperating in reunification efforts. A relative, who presumably has a broader interest in family unity, is more likely than a stranger to be supportive of the parent-child relationship and less likely to develop a conflicting emotional bond with the child.
>
> However, once the juvenile court determines at a permanency planning hearing that reunification is no longer possible and that a child should be freed

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In this case, Cassie was removed from the custody of her mother at birth and placed in a fragile infant care home because of her medical problems as a result of severe drug withdrawal. At that time, petitioners did not request custody or object Cassie's detention in foster care.

Following the Juvenile Court's assumption of jurisdiction over a minor (Welf. & Inst. Code § 300), the court then determines the dispositional issues of whether to declare the minor a dependent child of the court, and if so, whether to place the child outside of the parents' home. If there is a recommendation of out-of-home placement, the Department and the court must give preferential consideration *to a request by a relative* for placement of the child with that relative. Welf. & Inst. Code § 361.3. Again, in this case, at the dispositional hearing on Cassie's placement in December 1988, neither petitioners nor Stanley, Cassie's father, made any such request for placement in petitioners' home.

At any time during the course of a dependency action, any parent "or other person having an interest in a child who is a dependent of the juvenile court" may,

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> for adoption, there is no longer any reason to give relatives preferential consideration for placement.
>
> The overriding concern at this point is to provide a stable, permanent home in which a child can develop a lasting emotional attachment to his or her caretakers. It is for this reason that in any subsequent decision on adoptive placement, a foster parent to whom the minor already has "substantial emotional ties" is necessarily entitled to preference over all other candidates.

Id., at 1493-1494, citing Welf. & Inst. Code § 366.25(g), emphasis added.

"upon grounds of change of circumstance or new evidence, petition the court in the same action in which the child was found to be a dependent child of the juvenile court for a hearing to change, modify, or set aside any order of court previously made or to terminate the jurisdiction of the court". Welf. & Inst. Code § 388. In this case, both petitioners and Stanley could have requested custody of Cassie at any time between December 1988 and December 1989, before commencement of the permanency planning hearing. However, not until January 1990, after the permanent plan had been made and after the Owens had committed to adopting Cassie, did petitioners finally ask for custody of Cassie. For a young child such as Cassie, petitioners' request came too late. Removal of Cassie from her foster family, with whom she had strong emotional ties the equivalent of a healthy parent-child bond, would have been psychologically, emotionally and developmentally devastating to Cassie.[11]

If a dependent child's natural parents do not complete the court ordered reunification plan within a twelve-month period, the Juvenile Court must then determine whether reunification services should be terminated and which permanent plan - adoption, guardianship, or

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[11] Child welfare experts agree that continuity of relationships, surroundings, and environmental influence are essential for a child's normal development. Since these factors do not play the same role in later life, their importance is often underrated by the adult world. However, it has clearly been shown that any change of the caretaking person for infants and toddlers further affects the course of their emotional development. These attachments, at young ages, are as thoroughly upset by separations as they are effectively promoted by the constant, uninterrupted presence and attention of a familiar adult. Goldstein, Freud & Solnit, *Beyond the Best Interests of the Child* (1973), pp. 33-35.

long-term placement - should be implemented for the child. Welf. & Inst. Code §§ 366.25; 366.26. The California legislature and courts have expressed a clear preference that after twelve months of out-of-home placement, if the parents are unable to reunify with the child, the child should be adopted by the person with whom he or she has resided since the original removal.

> Notwithstanding any other provision of law, the application of any person who, as a foster parent, including relative caretakers, has care for a dependent child for whom the court has approved a permanent plan for adoption, or who has been freed for adoption, shall be given preference with respect to that child over all other applications for adoptive placement if the agency making the placement determines that the child has substantial emotional ties to the foster parent and removal from the foster parent would be seriously detrimental to the child's well-being. Welf. & Inst. Code §§ 366.25(g), 366.26(j).

It is noteworthy that Section 366.25(g) and 366.26(j) both refer to "relative *caretakers*," and not mere relatives. Clearly, the lawmakers recognize what the experts know – that the person with whom the child had resided and is bonded is the preferred permanent caregiver for the child.

Here, petitioners claim simultaneously that they, as relatives, have a fundamental right to custody of Cassie and that Stanley's fundamental right to bring up his child extends to his right to nominate fit surrogates. No court has ever so held. Petitioners do not suggest how the court is to reconcile the competing "rights" of the relatives and the parent. Nor do petitioners reconcile this unsupported proposition with the well-settled and paramount right of every child to be raised with love, emotional security and physical safety. See *In re Lynna B.* (1979) 92 Cal.App.3d

682, 699, citing *In re Eugene W.* (1972) 29 Cal.App.3d 623, 629.

Rather, petitioners argue that they have some constitutional right that should be accorded the same sanctity as a parental bond and that supersedes the child's best interests in this case. The law does not support any of petitioners' claims.

Instead, as petitioners themselves point out, the United States Supreme Court has recognized parental rights as fundamental in nature and of primary importance. See e.g., *Adoption of Baby Boy D.* (1984) 159 Cal.App.3d 8, 17, citing *Stanley v. Illinois*, 405 U.S. 645, 651 (1972). Dependency proceedings are instituted to protect the welfare of the child when parents abuse or otherwise fail to meet their responsibility. *Collins v. Superior Court* (1977) 77 Cal.App.3d 47, 52.

As the court explained in *In re Albert B.* (1989) 215 Cal.App.3d 361:

> While parenting is a fundamental right, . . . minors also have rights. As such, parenting rights are not absolute. The interests of parents in maintaining their relationship with their children must be balanced with the interests of children in secure and sufficient parenting.

Id., at 377-378, citing *In re Carmaleta B.* (1978) 21 Cal.3d 482, 489; *In re Angelia P.* (1981) 28 Cal.3d 908, 916-917. In dependency proceedings, "it is no longer open to question that the child's best interest must be paramount." *In re Micah S.* (1988) 198 Cal.App.3d 557, 565, conc. opn. of J. Brauer.

Just as parenting is not an absolute fundamental right, nor are the rights of an "extended family" absolutely guaranteed by the Constitution. While there are realms of family life which the State may not enter, *Prince v. Massachusetts*, 321 U.S. 158, 165-166 (1944), there are

also arenas, including family relationships, in which the state, as *parens patriae*, must involve itself. This case is an example.

Petitioners rely on various federal authorities for their argument that the extended family relationship must be accorded the same sanctity as a parental bond. In fact, none of the authorities cited by petitioners stand for this proposition. Indeed, in the context of child welfare proceedings, the courts have uniformly declined to elevate the extended family over those psychological parent relationships which have proven to be in the child's best interests.

Most notably, petitioners cite to *Moore v. City of East Cleveland*, 431 U.S. 496 (1977) to support their position. Petitioners reliance on *Moore* is misplaced. In that well-known case, appellant Moore challenged her criminal conviction under an East Cleveland zoning ordinance which limited occupancy of a dwelling unit to members of a single family. However, the ordinance defined "family" in such a way as to exclude appellant's household consisting of herself, her son, and two grandsons, also first cousins. *Id.*, at 495. In reversing appellant's conviction, this Court held that "the choice of relatives in this degree of kinship to live together may not be lightly denied by the State." *Id.*, at 506-507. Significantly, this Court did not state that the configuration of extended families may never be regulated by the state. In fact, the court expressly held that the family "is not beyond regulation". *Id.*, at 500. Rather, when a government intrudes on choices concerning family living arrangements, the court must examine carefully the importance of the governmental interest advanced and the extent to which they are served by the challenged statute. *Ibid.* Such an examination was indeed made by the lower courts in this case.

The result of the courts' analysis was that Cassie's placement with her foster family was in her best interests and was therefore upheld. Even after the weeks of testimony at the Section 388 and permanency planning hearing, as well as the subsequent appellate review, the lower courts found, based upon substantial evidence, that Cassie's psychological, emotional and developmental needs were promoted by her continued placement with the Owens, not by placement with petitioners.

Furthermore, contrary to petitioners' claims, neither the courts nor any state lawmakers have interpreted *Moore* to convey on relatives an absolute right to "configure" an extended family by gaining custody of minors through the Juvenile Court. For example, in the case of *In re Albert B., supra,* 215 Cal.App.3d at 381, the appellate court held that grandparents had no right to "reunification" with a minor, nor did they have even an absolute right to visitation. Welf. & Inst. Code §§ 361.5(a), 361.2(f). What is paramount to child custody issues is the child's best interests.

Petitioners also object that the best interest standard is vague. What petitioners term "vagueness" is instead a flexibility that each court must have in order to make informed decisions concerning a minor's welfare based on the particular facts before it. That flexibility does not invalidate the standard as an appropriate means of evaluating the minor's placement. Rather, as the court explained in *Jermistad v. McNelis* (1989) 210 Cal.App.3d 528, 553:

> The standard of best interest of the child has consistently been viewed as necessarily conferring upon the trial court a large measure of discretion in assigning custody between parties competing on an "equal footing." (See, e.g., 6

> Witkin, Summary of Cal.Law (8th ed. 1974) Parent and Child, sec. 72.) This stems from the subtle task at hand. The best interest of the child is in being raised by the best parent. But that is not a matter that can be ascertained by crude calculation. "[The] essence [of parenting] lies in the ethical, emotional, and intellectual guidance the parent gives to the child throughout his formative years, and often beyond. The source of this guidance is the adult's own experience of life; its motive power is parental love and concern for the child's wellbeing; and its teachings deal with such fundamental matters and the child's feelings about himself, his relationships with others, his system of values, his standards of conduct, his goals and priorities in life."

Id., at 553, quoting *In re Marriage of Carney* (1979) 24 Cal.3d 725, 739.

Although the court in *Jermistad, supra*, was speaking in the context of a domestic relations custody dispute, the principles are equally applicable in the juvenile court context. Custody of a child cannot be governed by absolutes, despite appellants' wishes that it be so. Child law authority Robert H. Mnookin articulately described the court's dilemma in such cases:

> When a judge must resolve a custody dispute, he is committed to making a choice among alternatives. The very words of the best-interest-of-the-child principle suggest that the judge should decide by choosing *the alternative that "maximizes" what is best for a particular child.*

R. Mnookin, Child Custody Adjudication: Judicial Functions in the Face of Indeterminacy, 39 Law & Contemp. Prob. (no. 3) 226, 255-268 (1975), emphasis added.

Finally, petitioners presume that foster families have no constitutionally protected liberty interest equal to those of parents or extended families. In discussing whether foster families have a constitutional right to

procedural protection, even at the expense of natural parents' rights, this Court has stated:

> We deal here with issues of unusual delicacy, in an area where professional judgments regarding desirable procedures are constantly and rapidly changing. In such a context, restraint is appropriate on the part of courts called upon to adjudicate whether a particular procedural scheme is adequate under the Constitution.

Smith v. Organ. of Foster Families for E. & Reform, 431 U.S. 816, 855-56 (1977).

A fortiori, this Court should exercise even greater restraint when balancing the lesser interests of non-parental relatives against *both* the rights of foster parents, who have become the minor's psychological parents, and the best interests of the minor herself. California statutes and case law are more than adequate to protest the interests of non-parental relatives. In this area of "unusual delicacy" entailing subtle "professional judgments," *Smith v. OFFER, supra*, at 855-56, no reason exists to graft onto California procedural law an absolute and unlimited constitutional custody preference for relatives.

CONCLUSION

In this case, the factual record clearly demonstrated that what is best for Cassie is to remain in the stable loving home provided by the Owens. It was the failure by the petitioners to come forward and assert their interest in custody of Cassie, prior to the permanency planning hearing, that led to the situation that petitioners seek to put before this Court. This case does not entail any failure of California law to protect the rights of parents, children, and their families. The issues in this case revolve around the factual determinations made by the lower courts as to the petitioners' lack of willingness to offer Cassie a home before she had bonded to her foster parents. Accordingly,

there are no issues in this case which would warrant hearing by this Court on the petition for certiorari.

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Respectfully submitted,

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